(1) *Date of receipt of notification.* If the FRA Safety Inspector provides written notification to the railroad by first class mail, then for purposes of determining the calendar month in which notification is received, the railroad shall be presumed to have received the notification five business days following the date of mailing.

(2) *Completion of Form FRA F 6180.96, including selection of railroad remedial action code.* Each railroad shall complete the remedial actions report in the manner prescribed on the report form. The railroad shall select the one remedial action code on the reporting form that most accurately reflects the action or actions that it took to remedy the failure, such as, repair or replacement of a defective component without movement, movement of a locomotive or car for repair (where permitted) and its subsequent repair, completion of a required test or inspection, removal of a noncomplying item from service but not for repair (where permitted), reduction of operating speed (where sufficient to achieve compliance), or any combination of actions appropriate to remedy the noncompliance cited. Any railroad selecting the remedial action code ''other remedial actions'' shall also furnish FRA with a brief narrative description of the action or actions taken.

(3) *Submission of Form FRA F 6180.96.* The railroad shall return the form by first class mail to the FRA Safety Inspector whose name and address appear on the form.

(b) Any railroad concluding that the violation alleged on the inspection report may not have occurred may submit the remedial actions report with an appropriate written explanation. Failure to raise all pertinent defenses does not foreclose the railroad from doing so in response to a penalty demand.

§ 209.407 Delayed reports.

(a) If a railroad cannot initiate or complete remedial actions within 30 days after the end of the calendar month in which the notification is received, it shall—

(1) Prepare, in writing, an explanation of the reasons for such delay and a good faith estimate of the date by which it will complete the remedial actions, stating the name and job title of the preparer and including either:

(i) A photocopy of both sides of the Form FRA F 6180.96 on which the railroad received notification; or

(ii) The following information:

(A) The inspection report number;

(B) The inspection date; and

(C) The item number; and

(2) Sign, date, and submit such written explanation and estimate, by first class mail, to the FRA Safety Inspector whose name and address appear on the notification, within 30 days after the end of the calendar month in which the notification is received.

(b) Within 30 days after the end of the calendar month in which all such remedial actions are completed, the railroad shall report in accordance with the remedial action code procedures referenced in § 209.405(a). The additional time provided by this section for a railroad to submit a delayed report shall not excuse it from liability for any continuing violation of a provision of the Federal railroad safety laws.

§ 209.409 Penalties.

Any person who violates any requirement of this subpart or causes the violation of any such requirement is subject to a civil penalty of at least $500 and not more than $11,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed $22,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense. A person may also be subject to the criminal penalties provided for in 49 U.S.C. 21311 (formerly codified in 45 U.S.C. 438(e)) for knowingly and willfully falsifying reports required by this subpart.

[59 FR 43676, Aug. 24, 1994, as amended at 63 FR 11619, Mar. 10, 1998]

APPENDIX A TO PART 209—STATEMENT OF AGENCY POLICY CONCERNING ENFORCEMENT OF THE FEDERAL RAILROAD SAFETY LAWS

The Federal Railroad Administration (''fra'') enforces the federal railroad safety statutes under delegation from the Secretary of Transportation. See 49 CFR 1.49 (c), (d), (f), (g), and (m). Those statutes include the Federal Railroad Safety Act of 1970 (''Safety Act''), 45 U.S.C. 421 *et seq.*, and a group of statutes enacted prior to 1970 referred to collectively herein as the ''older safety statutes'': The Safety Appliance Acts, 45 U.S.C. 1–16; the Locomotive Inspection Act, 45 U.S.C. 22–34; the Accident Reports Act, 45 U.S.C. 38–43; the Hours of Service Act, 45 U.S.C. 61–64b; and the Signal Inspection Act, 49 App. U.S.C. 26. Regulations implementing those statutes are found at 49 CFR parts 213 through 236. The Rail Safety Improvement Act of 1988 (Pub. L. No. 100–342, enacted June 22, 1988) (''RSIA'') raised the maximum civil penalties available under the railroad safety laws and made individuals liable for willful violations of those laws. FRA also enforces the Hazardous Materials Transportation Act, 49 App. U.S.C. 1801 *et seq.*, as it pertains to the shipment or transportation of hazardous materials by rail.

THE CIVIL PENALTY PROCESS

The front lines in the civil penalty process are the FRA safety inspectors: FRA employs over 300 inspectors, and their work is supplemented by approximately 100 inspectors from states participating in enforcement of the federal rail safety laws. These inspectors routinely inspect the equipment, track, and signal systems and observe the operations of the nation's railroads. They also investigate hundreds of complaints filed annually by those alleging noncompliance with the laws. When inspection or complaint investigation reveals noncompliance with the laws, each noncomplying condition or action is listed on an inspection report. Where the inspector determines that the best method of promoting compliance is to assess a civil penalty, he or she prepares a violation report, which is essentially a recommendation to the FRA Office of Chief Counsel to assess a penalty based on the evidence provided in or with the report.

In determining which instances of noncompliance merit penalty recommendations, the inspector considers:

(1) The inherent seriousness of the condition or action;

(2) The kind and degree of potential safety hazard the condition or action poses in light of the immediate factual situation;

(3) Any actual harm to persons or property already caused by the condition or action;

(4) The offending person's (*i.e.*, railroad's or individual's) general level of current compliance as revealed by the inspection as a whole;

(5) The person's recent history of compliance with the relevant set of regulations, especially at the specific location or division of the railroad involved;

(6) Whether a remedy other than a civil penalty (ranging from a warning on up to an emergency order) is more appropriate under all of the facts; and

(7) Such other factors as the immediate circumstances make relevant.

The civil penalty recommendation is reviewed at the regional level by a specialist in the subject matter involved, who requires correction of any technical flaws and determines whether the recommendation is consistent with national enforcement policy in similar circumstances. Guidance on that policy in close cases is sometimes sought from Office of Safety headquarters. Violation reports that are technically and legally sufficient and in accord with FRA policy are sent from the regional office to the Office of Chief Counsel.

The exercise of this discretion at the field and regional levels is a vital part of the enforcement process, ensuring that the exacting and time-consuming civil penalty process is used to address those situations most in need of the deterrent effect of penalties. FRA exercises that discretion with regard to individual violators in the same manner it does with respect to railroads.

The Office of Chief Counsel's Safety Division reviews each violation report it receives from the regional offices for legal sufficiency and assesses penalties based on those allegations that survive that review. Historically, the Division has returned to the regional offices less than five percent of the reports submitted in a given year, often with a request for further work and resubmission.

Where the violation was committed by a railroad, penalties are assessed by issuance of a penalty demand letter that summarizes the claims, encloses the violation report with a copy of all evidence on which FRA is relying in making its initial charge, and explains that the railroad may pay in full or submit, orally or in writing, information concerning any defenses or mitigating factors. The railroad safety statutes, in conjunction with the Federal Claims Collection Act, authorize FRA to adjust or compromise the initial penalty claims based on a wide variety of mitigating factors. This system permits the efficient collection of civil penalties in amounts that fit the actual offense without resort to time-consuming and expensive litigation. Over its history, FRA has had to request that the Attorney General bring suit to collect a penalty on only a very few occasions.

Once penalties have been assessed, the railroad is given a reasonable amount of time to investigate the charges. Larger railroads usually make their case before FRA in an informal conference covering a number of case files that have been issued and investigated since the previous conference. Thus, in terms of the negotiating time of both sides, economies of scale are achieved that would be impossible if each case were negotiated separately. The settlement conferences, held either in Washington or another mutually agreed on location, include technical experts from both FRA and the railroad as well as lawyers for both parties. In addition to allowing the two sides to make their cases for the relative merits of the various claims, these conferences also provide a forum for addressing current compliance problems. Smaller railroads usually prefer to handle negotiations through the mail or over the telephone, often on a single case at a time. Once the two sides have agreed to an amount on each case, that agreement is put in writing and a check is submitted to FRA's accounting division covering the full amount agreed on.

Cases brought under the Hazardous Materials Transportation Act, 49 App. U.S.C. 1801 *et seq.*, are, due to certain statutory requirements, handled under more formal administrative procedures. *See* 49 CFR part 209, subpart B.

CIVIL PENALTIES AGAINST INDIVIDUALS

The RSIA amended the penalty provisions of the railroad safety statutes to make them applicable to any ''person (including a railroad and any manager, supervisor, official, or other employee or agent of a railroad)'' who fails to comply with the regulations or statutes. *E.g.*, section 3 of the RSIA, amending section 209 of the Safety Act. However, the RSIA also provided that civil penalties may be assessed against individuals ''only for willful violations.''

Thus, any individual meeting the statutory description of ''person'' is liable for a civil penalty for a willful violation of, or for willfully causing the violation of, the safety statutes or regulations. Of course, as has traditionally been the case with respect to acts of noncompliance by railroads, the FRA field inspector exercises discretion in deciding which situations call for a civil penalty assessment as the best method of ensuring compliance. The inspector has a range of options, including an informal warning, a more formal warning letter issued by the Safety Division of the Office of Chief Counsel, recommendation of a civil penalty assessment, recommendation of disqualification or suspension from safety-sensitive service, or, under the most extreme circumstances, recommendation of emergency action.

The threshold question in any alleged violation by an individual will be whether that violation was ''willful.'' (Note that section 3(a) of the RSIA, which authorizes suspension or disqualification of a person whose violation of the safety laws has shown him or her to be unfit for safety-sensitive service, does not require a showing of willfulness. Regulations implementing that provision are found at 49 CFR part 209, subpart D.) FRA proposed this standard of liability when, in 1987, it originally proposed a statutory revision authorizing civil penalties against individuals. FRA believed then that it would be too harsh a system to collect fines from individuals on a strict liability basis, as the safety statutes permit FRA to do with respect to railroads. FRA also believed that even a reasonable care standard (*e.g.*, the Hazardous Materials Transportation Act's standard for civil penalty liability, 49 U.S.C. 1809(a)) would subject individuals to civil penalties in more situations than the record warranted. Instead, FRA wanted the authority to penalize those who violate the safety laws through a purposeful act of free will.

Thus, FRA considers a ''willful'' violation to be one that is an intentional, voluntary act committed either with knowledge of the relevant law or reckless disregard for whether the act violated the requirements of the law. Accordingly, neither a showing of evil purpose (as is sometimes required in certain criminal cases) nor actual knowledge of the law is necessary to prove a willful violation, but a level of culpability higher than negligence must be demonstrated. *See Trans World Airlines, Inc.* v. *Thurston,* 469 U.S. 111 (1985); *Brock* v. *Morello Bros. Constr., Inc.* 809 F.2d 161 (1st Cir. 1987); and *Donovan* v. *Williams Enterprises, Inc.*, 744 F.2d 170 (D.C. Cir. 1984).

Reckless disregard for the requirements of the law can be demonstrated in many ways. Evidence that a person was trained on or made aware of the specific rule involved—or, as is more likely, its corresponding industry equivalent—would suffice. Moreover, certain requirements are so obviously fundamental to safe railroading (*e.g.,* the prohibition against disabling an automatic train control device) that any violation of them, regardless of whether the person was actually aware of the prohibition, should be seen as reckless disregard of the law. *See Brock, supra,* 809 F.2d 164. Thus, a lack of subjective knowledge of the law is no impediment to a finding of willfulness. If it were, a mere denial of the content of the particular regulation would provide a defense. Having proposed use of the word ''willful,'' FRA believes it was not intended to insulate from liability those who simply claim—contrary to the established facts of the case—they had no reason to believe their conduct was wrongful.

A willful violation entails knowledge of the facts constituting the violation, but actual, subjective knowledge need not be demonstrated. It will suffice to show objectively what the alleged violator must have known of the facts based on reasonable inferences drawn from the circumstances. For example, a person shown to have been responsible for performing an initial terminal air brake test that was not in fact performed would not be able to defend against a charge of a willful violation simply by claiming subjective ignorance of the fact that the test was not performed. If the facts, taken as a whole, demonstrated that the person was responsible for doing the test and had no reason to believe it was performed by others, and if that person was shown to have acted with actual knowledge of or reckless disregard for the law requiring such a test, he or she would be subject to a civil penalty.

This definition of ''willful'' fits squarely within the parameters for willful acts laid out by Congress in the RSIA and its legislative history. Section 3(a) of the RSIA amends the Safety Act to provide:

For purposes of this section, an individual shall be deemed not to have committed a willful violation where such individual has acted pursuant to the direct order of a railroad official or supervisor, under protest communicated to the supervisor. Such individual shall have the right to document such protest.

As FRA made clear when it recommended legislation granting individual penalty authority, a railroad employee should not have to choose between liability for a civil penalty or insubordination charges by the railroad. Where an employee (or even a supervisor) violates the law under a direct order from a supervisor, he or she does not do so of his or her free will. Thus, the act is not a voluntary one and, therefore, not willful under FRA's definition of the word. Instead, the action of the person who has directly ordered the commission of the violation is itself a willful violation subjecting that person to a civil penalty. As one of the primary sponsors of the RSIA said on the Senate floor:

This amendment also seeks to clarify that the purpose of imposing civil penalties against individuals is to deter those who, of their free will, decide to violate the safety laws. The purpose is not to penalize those who are ordered to commit violations by those above them in the railroad chain of command. Rather, in such cases, the railroad official or supervisor who orders the others to violate the law would be liable for any violations his order caused to occur. One example is the movement of railroad cars or locomotives that are actually known to contain certain defective conditions. A train crew member who was ordered to move such equipment would not be liable for a civil penalty, and his participation in such movements could not be used against him in any disqualification proceeding brought by FRA. 133 Cong. Rec. S.15899 (daily ed. Nov. 5, 1987) (remarks of Senator Exon).

It should be noted that FRA will apply the same definition of ''willful'' to corporate acts as is set out here with regard to individual violations. Although railroads are strictly liable for violations of the railroad safety laws and deemed to have knowledge of those laws, FRA's penalty schedules contain, for each regulation, a separate amount earmarked as the initial assessment for willful violations. Where FRA seeks such an extraordinary penalty from a railroad, it will apply the definition of ''willful'' set forth above. In such cases—as in all civil penalty cases brought by FRA—the aggregate knowledge and actions of the railroad's managers, supervisors, employees, and other agents will be imputed to the railroad. Thus, in situations that FRA decides warrant a civil penalty based on a willful violation, FRA will have the option of citing the railroad and/or one or more of the individuals involved. In cases against railroads other than those in which FRA alleges willfulness or in which a particular regulation imposes a special standard, the principles of strict liability and presumed knowledge of the law will continue to apply.

The RSIA gives individuals the right to protest a direct order to violate the law and to document the protest. FRA will consider such protests and supporting documentation in deciding whether and against whom to cite civil penalties in a particular situation. Where such a direct order has been shown to have been given as alleged, and where such a protest is shown to have been communicated to the supervisor, the person or persons communicating it will have demonstrated their lack of willfulness. Any documentation of the protest will be considered along with all other evidence in determining whether the alleged order to violate was in fact given.

However, the absence of such a protest will not be viewed as warranting a presumption of willfulness on the part of the employee who might have communicated it. The statute says that a person who communicates such a protest shall be deemed not to have acted willfully; it does not say that a person who does not communicate such a protest will be deemed to have acted willfully. FRA would have to prove from all the pertinent facts that the employee willfully violated the law. Moreover, the absence of a protest would not be dispositive with regard to the willfulness of a supervisor who issued a direct order to violate the law. That is, the supervisor who allegedly issued an order to violate will not be able to rely on the employee's failure to protest the order as a complete defense. Rather, the issue will be

whether, in view of all pertinent facts, the supervisor intentionally and voluntarily ordered the employee to commit an act that the supervisor knew would violate the law or acted with reckless disregard for whether it violated the law.

FRA exercises the civil penalty authority over individuals through informal procedures very similar to those used with respect to railroad violations. However, FRA varies those procedures somewhat to account for differences that may exist between the railroad's ability to defend itself against a civil penalty charge and an individual's ability to do so. First, when the field inspector decides that an individual's actions warrant a civil penalty recommendation and drafts a violation report, the inspector or the regional director informs the individual in writing of his or her intention to seek assessment of a civil penalty and the fact that a violation report has been transmitted to the Office of Chief Counsel. This ensures that the individual has the opportunity to seek counsel, preserve documents, or take any other necessary steps to aid his or her defense at the earliest possible time.

Second, if the Office of Chief Counsel concludes that the case is meritorious and issues a penalty demand letter, that letter makes clear that FRA encourages discussion, through the mail, over the telephone or in person, of any defenses or mitigating factors the individual may wish to raise. That letter also advises the individual that he or she may wish to obtain representation by an attorney and/or labor representative. During the negotiation stage, FRA considers each case individually on its merits and gives due weight to whatever information the alleged violator provides.

Finally, in the unlikely event that a settlement cannot be reached, FRA sends the individual a letter warning of its intention to request that the Attorney General sue for the initially proposed amount and giving the person a sufficient interval (*e.g.*, 30 days) to decide if that is the only alternative.

FRA believes that the intent of Congress would be violated if individuals who agree to pay a civil penalty or are ordered to do so by a court are indemnified for that penalty by the railroad or another institution (such as a labor organization). Congress intended that the penalties have a deterrent effect on individual behavior that would be lessened, if not eliminated, by such indemnification.

Although informal, face-to-face meetings are encouraged during the negotiation of a civil penalty charge, the RSIA does not require that FRA give individuals or railroads the opportunity for a formal, trial-type administrative hearing as part of the civil penalty process. FRA does not provide that opportunity because such administrative hearings would be likely to add significantly to the costs an individual would have to bear in defense of a safety claim (and also to FRA's enforcement expenses) without shedding any more light on what resolution of the matter is fair than would the informal procedures set forth here. Of course, should an individual or railroad decide not to settle, that person would be entitled to a trial *de novo* when FRA, through the Attorney General, sued to collect the penalty in the appropriate United States district court.

PENALTY SCHEDULES; ASSESSMENT OF MAXIMUM PENALTIES

As recommended by the Department of Transportation in its initial proposal for rail safety legislative revisions in 1987, the RSIA raised the maximum civil penalties for violations of the safety regulations. Under the Hours of Service Act, the penalty was changed from a flat $500 to a penalty of ''up to $1,000, as the Secretary of Transportation deems reasonable.'' Under all the other statutes, the maximum penalty was raised from $2,500 to $10,000 per violation, except that ''where a grossly negligent violation or pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury,'' a penalty of up to $20,000 per violation may be assessed.

The Rail Safety Enforcement and Review Act of 1992 (RSERA) increased the maximum penalty from $1,000 to $10,000 and in some cases, $20,000 for a violation of the Hours of Service Laws, making these penalty amounts uniform with those of FRA's other regulatory provisions. RSERA also increased the minimum civil monetary penalty from $250 to $500 for all of FRA's regulatory provisions. The Federal Civil Penalties Inflation Adjustment Act of 1990, Public Law 101–410, 104 Stat. 890, note, as amended by Section 31001(s)(1) of the Debt Collection Improvement Act of 1996 Public Law 104–134, 110 Stat. 1321–373, April 26, 1996 required that agencies adjust by regulation each maximum civil monetary penalty within the agency's jurisdiction for inflation and make subsequent adjustments once every four years after the initial adjustment. Accordingly, FRA's maximum civil monetary penalties have been adjusted.

FRA's traditional practice has been to issue penalty schedules assigning to each particular regulation specific dollar amounts for initial penalty assessments. The schedule (except where issued after notice and an opportunity for comment) constitutes a statement of agency policy, and is ordinarily issued as an appendix to the relevant part of the Code of Federal Regulations. For each regulation, the schedule shows two amounts within the $500 to $11,000 range in separate columns, the first for ordinary violations, the second for willful violations (whether committed by railroads or individuals). In

one instance—part 231—the schedule refers to sections of the relevant FRA defect code rather than to sections of the CFR text. Of course, the defect code, which is simply a reorganized version of the CFR text used by FRA to facilitate computerization of inspection data, is substantively identical to the CFR text.

The schedule amounts are meant to provide guidance as to FRA's policy in predictable situations, not to bind FRA from using the full range of penalty authority where extraordinary circumstances warrant. The Senate report on the bill that became the RSIA stated:

It is expected that the Secretary would act expeditiously to set penalty levels commensurate with the severity of the violations, with imposition of the maximum penalty reserved for violation of any regulation where warranted by exceptional circumstances. S. Rep. No. 100–153, 10th Cong., 2d Sess. 8 (1987).

Accordingly, under each of the schedules (ordinarily in a footnote), and regardless of the fact that a lesser amount might be shown in both columns of the schedule, FRA reserves the right to assess the statutory maximum penalty of up to $22,000 per violation where a grossly negligent violation has created an imminent hazard of death or injury. This authority to assess a penalty for a single violation above $11,000 and up to $22,000 is used only in very exceptional cases to penalize egregious behavior. Where FRA avails itself of this right to use the higher penalties in place of the schedule amount it so indicates in its penalty demand letter.

THE EXTENT AND EXERCISE OF FRA'S SAFETY JURISDICTION

The Safety Act and, as amended by the RSIA, the older safety statutes apply to ''railroads.'' Section 202(e) of the Safety Act defines railroad as follows:

The term ''railroad'' as used in this title means all forms of non-highway ground transportation that run on rails or electromagnetic guideways, including (1) commuter or other short-haul rail passenger service in a metropolitan or suburban area, as well as any commuter rail service which was operated by the Consolidated Rail Corporation as of January 1, 1979, and (2) high speed ground transportation systems that connect metropolitan areas, without regard to whether they use new technologies not associated with traditional railroads. Such term does not include rapid transit operations within an urban area that are not connected to the general railroad system of transportation.

Prior to 1988, the older safety statutes had applied only to common carriers engaged in interstate or foreign commerce by rail. The Safety Act, by contrast, was intended to reach as far as the Commerce Clause of the Constitution (i.e., to all railroads that affect interstate commerce) rather than be limited to common carriers actually engaged in interstate commerce. In reporting out the bill that became the 1970 Safety Act, the House Committee on Interstate and Foreign Commerce stated:

The Secretary's authority to regulate extends to all areas of railroad safety. This legislation is intended to encompass all those means of rail transportation as are commonly included within the term. Thus, ''railroad'' is not limited to the confines of ''common carrier by railroad'' as that language is defined in the Interstate Commerce Act.

H.R. Rep. No. 91–1194, 91st Cong., 2d Sess. at 16 (1970).

FRA's jurisdiction was bifurcated until, in 1988, the RSIA amended the older safety statutes to make them coextensive with the Safety Act by making them applicable to railroads and incorporating the Safety Act's definition of the term (*e.g.*, 45 U.S.C. 16, as amended). The RSIA also made clear that FRA's safety jurisdiction is not confined to entities using traditional railroad technology. The new definition of ''railroad'' emphasized that all non-highway high speed ground transportation systems—regardless of technology used—would be considered railroads.

Thus, with the exception of self-contained urban rapid transit systems, FRA's statutory jurisdiction extends to all entities that can be construed as railroads by virtue of their providing non-highway ground transportation over rails or electromagnetic guideways, and will extend to future railroads using other technologies not yet in use. For policy reasons, however, FRA does not exercise jurisdiction under all of its regulations to the full extent permitted by statute. Based on its knowledge of where the safety problems were occurring at the time of its regulatory action and its assessment of the practical limitations on its role, FRA has, in each regulatory context, decided that the best option was to regulate something less than the total universe of railroads.

For example, all of FRA's regulations exclude from their reach railroads whose entire operations are confined to an industrial installation (i.e., ''plant railroads''), such as those in steel mills that do not go beyond the plant's boundaries. E.g., 49 CFR 225.3(a)(1) (accident reporting regulations). Some rules exclude passenger operations that are not part of the general railroad system (such as some tourist railroads) only if they meet the definition of ''insular.'' E.g., 49 CFR 225.3(a)(3) (accident reporting) and 234.3(c) (grade crossing signal safety). Other regulations exclude not only plant railroads but all other railroads that are not operated as a part of, or over the lines of, the general railroad system of transportation. E.g., 49 CFR 214.3 (railroad workplace safety).

By ''general railroad system of transportation,'' FRA refers to the network of standard gage track over which goods may be transported throughout the nation and passengers may travel between cities and within metropolitan and suburban areas. Much of this network is interconnected, so that a rail vehicle can travel across the nation without leaving the system. However, mere physical connection to the system does not bring trackage within it. For example, trackage within an industrial installation that is connected to the network only by a switch for the receipt of shipments over the system is not a part of the system.

Moreover, portions of the network may lack a physical connection but still be part of the system by virtue of the nature of operations that take place there. For example, the Alaska Railroad is not physically connected to the rest of the general system but is part of it. The Alaska Railroad exchanges freight cars with other railroads by car float and exchanges passengers with interstate carriers as part of the general flow of interstate commerce. Similarly, an intercity high speed rail system with its own right of way would be part of the general system although not physically connected to it. The presence on a rail line of any of these types of railroad operations is a sure indication that such trackage is part of the general system: the movement of freight cars in trains outside the confines of an industrial installation, the movement of intercity passenger trains, or the movement of commuter trains within a metropolitan or suburban area. Urban rapid transit operations are ordinarily not part of the general system, but may have sufficient connections to that system to warrant exercise of FRA's jurisdiction (*see* discussion of passenger operations, below). Tourist railroad operations are not inherently part of the general system and, unless operated over the lines of that system, are subject to few of FRA's regulations.

The boundaries of the general system are not static. For example, a portion of the system may be purchased for the exclusive use of a single private entity and all connections, save perhaps a switch for receiving shipments, severed. Depending on the nature of the operations, this could remove that portion from the general system. The system may also grow, as with the establishment of intercity service on a brand new line. However, the same trackage cannot be both inside and outside of the general system depending upon the time of day. If trackage is part of the general system, restricting a certain type of traffic over that trackage to a particular portion of the day does not change the nature of the line—it remains the general system.

Of course, even where a railroad operates outside the general system, other railroads that are definitely part of that system may have occasion to enter the first railroad's property (*e.g.*, a major railroad goes into a chemical or auto plant to pick up or set out cars). In such cases, the railroad that is part of the general system remains part of that system while inside the installation; thus, all of its activities are covered by FRA's regulations during that period. The plant railroad itself, however, does not get swept into the general system by virtue of the other railroad's activity, except to the extent it is liable, as the track owner, for the condition of its track over which the other railroad operates during its incursion into the plant. Of course, in the opposite situation, where the plant railroad itself operates beyond the plant boundaries on the general system, it becomes a railroad with respect to those particular operations, during which its equipment, crew, and practices would be subject to FRA's regulations.

In some cases, the plant railroad leases track immediately adjacent to its plant from the general system railroad. Assuming such a lease provides for, and actual practice entails, the exclusive use of that trackage by the plant railroad and the general system railroad for purposes of moving only cars shipped to or from the plant, the lease would remove the plant railroad's operations on that trackage from the general system for purposes of FRA's regulations, as it would make that trackage part and parcel of the industrial installation. (As explained above, however, the track itself would have to meet FRA's standards if a general system railroad operated over it. *See* 49 CFR 213.5 for the rules on how an owner of track may assign responsibility for it.) A lease or practice that permitted other types of movements by general system railroads on that trackage would, of course, bring it back into the general system, as would operations by the plant railroad indicating it was moving cars on such trackage for other than its own purposes (*e.g.*, moving cars to neighboring industries for hire).

FRA exercises jurisdiction over tourist, scenic, and excursion railroad operations whether or not they are conducted on the general railroad system. There are two exceptions: (1) operations of less than 24-inch gage (which, historically, have never been considered railroads under the Federal railroad safety laws); and (2) operations that are off the general system and ''insular'' (defined below).

Insularity is an issue only with regard to tourist operations over trackage outside of the general system used exclusively for such operations. FRA considers a tourist operation to be insular if its operations are limited to a separate enclave in such a way that there is no reasonable expectation that the safety of any member of the public'except a

business guest, a licensee of the tourist operation or an affiliated entity, or a trespasser'would be affected by the operation. A tourist operation will not be considered insular if one or more of the following exists on its line:

•A public highway-rail crossing that is in use;

•An at-grade rail crossing that is in use;

•A bridge over a public road or waters used for commercial navigation; or

•A common corridor with a railroad, *i.e.*, its operations are within 30 feet of those of any railroad.

When tourist operations are conducted on the general system, FRA exercises jurisdiction over them, and all of FRA's pertinent regulations apply to those operations unless a waiver is granted or a rule specifically excepts such operations (*e.g.*, the passenger equipment safety standards contain an exception for these operations, 49 CFR 238.3(c)(3), even if conducted on the general system). When a tourist operation is conducted only on track used exclusively for that purpose it is not part of the general system. The fact that a tourist operation has a switch that connects it to the general system does not make the tourist operation part of the general system if the tourist trains do not enter the general system and the general system railroad does not use the tourist operation's trackage for any purpose other than delivering or picking up shipments to or from the tourist operation itself.

If a tourist operation off the general system is insular, FRA does not exercise jurisdiction over it, and none of FRA's rules apply. If, however, such an operation is not insular, FRA exercises jurisdiction over the operation, and some of FRA's rules (*i.e.*, those that specifically apply beyond the general system to such operations) will apply. For example, FRA's rules on accident reporting, steam locomotives, and grade crossing signals apply to these non-insular tourist operations (*see* 49 CFR 225.3, 230.2 amd 234.3), as do all of FRA's procedural rules (49 CFR parts 209, 211, and 216) and the Federal railroad safety statutes themselves.

In drafting safety rules, FRA has a specific obligation to consider financial, operational, or other factors that may be unique to tourist operations. 49 U.S.C. 20103(f). Accordingly, FRA is careful to consider those factors in determining whether any particular rule will apply to tourist operations. Therefore, although FRA asserts jurisdiction quite broadly over these operations, we work to ensure that the rules we issue are appropriate to their somewhat special circumstances.

It is important to note that FRA's exercise of its regulatory authority on a given matter does not preclude it from subsequently amending its regulations on that subject to bring in railroads originally excluded. More important, the self-imposed restrictions on FRA's exercise of regulatory authority in no way constrain its exercise of emergency order authority under section 203 of the Safety Act. That authority was designed to deal with imminent hazards not dealt with by existing regulations and/or so dangerous as to require immediate, *ex parte* action on the government's part. Thus, a railroad excluded from the reach of any of FRA's regulations is fully within the reach of FRA's emergency order authority, which is coextensive with FRA's statutory jurisdiction over all railroads.

FRA's Policy on Jurisdiction Over Passenger Operations

Under the Federal railroad safety laws, FRA has jurisdiction over all railroads except ''rapid transit operations in an urban area that are not connected to the general railroad system of transportation.'' 49 U.S.C. 20102. Within the limits imposed by this authority, FRA exercises jurisdiction over all railroad passenger operations, regardless of the equipment they use, unless FRA has specifically stated below an exception to its exercise of jurisdiction for a particular type of operation. This policy is stated in general terms and does not change the reach of any particular regulation under its applicability section. That is, while FRA may generally assert jurisdiction over a type of operation here, a particular regulation may exclude that kind of operation from its reach. Therefore, this statement should be read in conjunction with the applicability sections of all of FRA's regulations.

Intercity Passenger Operations

FRA exercises jurisdiction over all intercity passenger operations. Because of the nature of the service they provide, standard gage intercity operations are all considered part of the general railroad system, even if not physically connected to other portions of the system. Other intercity passenger operations that are not standard gage (such as a magnetic levitation system) are within FRA's jurisdiction even though not part of the general system.

Commuter Operations

FRA exercises jurisdiction over all commuter operations. Congress apparently intended that FRA do so when it enacted the Federal Railroad Safety Act of 1970, and made that intention very clear in the 1982 and 1988 amendments to that act. FRA has attempted to follow that mandate consistently. A commuter system's connection to other railroads is not relevant under the rail safety statutes. In fact, FRA considers commuter railroads to be part of the general railroad system regardless of such connections.

FRA will presume that an operation is a commuter railroad if there is a statutory determination that Congress considers a particular service to be commuter rail. For example, in the Northeast Rail Service Act of 1981, 45 U.S.C. 1104(3), Congress listed specific commuter authorities. If that presumption does not apply, and the operation does not meet the description of a system that is presumptively urban rapid transit (see below), FRA will determine whether a system is commuter or urban rapid transit by analyzing all of the system's pertinent facts. FRA is likely to consider an operation to be a commuter railroad if:

•The system serves an urban area, its suburbs, and more distant outlying communities in the greater metropolitan area,

•The system's primary function is moving passengers back and forth between their places of employment in the city and their homes within the greater metropolitan area, and moving passengers from station to station within the immediate urban area is, at most, an incidental function, and

•The vast bulk of the system's trains are operated in the morning and evening peak periods with few trains at other hours.

Examples of commuter railroads include Metra and the Northern Indiana Commuter Transportation District in the Chicago area; Virginia Railway Express and MARC in the Washington area; and Metro-North, the Long Island Railroad, New Jersey Transit, and the Port Authority Trans Hudson (PATH) in the New York area.

OTHER SHORT HAUL PASSENGER SERVICE

The federal railroad safety statutes give FRA authority over ''commuter or other short-haul railroad passenger service in a metropolitan or suburban area.'' 49 U.S.C. 20102. This means that, in addition to commuter service, there are other short-haul types of service that Congress intended that FRA reach. For example, a passenger system designed primarily to move intercity travelers from a downtown area to an airport, or from an airport to a resort area, would be one that does not have the transportation of commuters within a metropolitan area as its primary purpose. FRA would ordinarily exercise jurisdiction over such a system as ''other short-haul service'' unless it meets the definition of urban rapid transit and is not connected in a significant way to the general system.

URBAN RAPID TRANSIT OPERATIONS

One type of short-haul passenger service requires special treatment under the safety statutes: ''rapid transit operations in an urban area.'' Only these operations are excluded from FRA's jurisdiction, and only if they are ''not connected to the general railroad system.'' FRA will presume that an operation is an urban rapid transit operation if the system is not presumptively a commuter railroad (see discussion above) the operation is a subway or elevated operation with its own track system on which no other railroad may operate, has no highway-rail crossings at grade, operates within an urban area, and moves passengers from station to station within the urban area as one of its major functions.

Where neither the commuter railroad nor urban rapid transit presumptions applies, FRA will look at all of the facts pertinent to a particular operation to determine its proper characterization. FRA is likely to consider an operation to be urban rapid transit if:

•The operation serves an urban area (and may also serve its suburbs),

•Moving passengers from station to station within the urban boundaries is a major function of the system and there are multiple station stops within the city for that purpose (such an operation could still have the transportation of commuters as one of its major functions without being considered a commuter railroad), and

•The system provides frequent train service even outside the morning and evening peak periods.

Examples of urban rapid transit systems include the Metro in the Washington, D.C. area, CTA in Chicago, and the subway systems in New York, Boston, and Philadelphia. The type of equipment used by such a system is not determinative of its status. However, the kinds of vehicles ordinarily associated with street railways, trolleys, subways, and elevated railways are the types of vehicles most often used for urban rapid transit operations.

FRA can exercise jurisdiction over a rapid transit operation only if it is connected to the general railroad system, but need not exercise jurisdiction over every such operation that is so connected. FRA is aware of several different ways that rapid transit operations can be connected to the general system. Our policy on the exercise of jurisdiction will depend upon the nature of the connection(s). In general, a connection that involves operation of transit equipment as a part of, or over the lines of, the general system will trigger FRA's exercise of jurisdiction. Below, we review some of the more common types of connections and their effect on the agency's exercise of jurisdiction. This is not meant to be an exhaustive list of connections.

RAPID TRANSIT CONNECTIONS SUFFICIENT TO TRIGGER FRA'S EXERCISE OF JURISDICTION

Certain types of connections to the general railroad system will cause FRA to exercise jurisdiction over the rapid transit line *to the extent it is connected.* FRA will exercise jurisdiction over the portion of a rapid transit operation that is conducted as a part of or over

the lines of the general system. For example, rapid transit operations are conducted on the lines of the general system where the rapid transit operation and other railroad use the same track. FRA will exercise its jurisdiction over the operations conducted on the general system. In situations involving joint use of the same track, it does not matter that the rapid transit operation occupies the track only at times when the freight, commuter, or intercity passenger railroad that shares the track is not operating. While such time separation could provide the basis for waiver of certain of FRA's rules (see 49 CFR part 211), it does not mean that FRA will not exercise jurisdiction. However, FRA will exercise jurisdiction over only the portions of the rapid transit operation that are conducted on the general system. For example, a rapid transit line that operates over the general system for a portion of its length but has significant portions of street railway that are not used by conventional railroads would be subject to FRA's rules only with respect to the general system portion. The remaining portions would not be subject to FRA's rules. If the non-general system portions of the rapid transit line are considered a ''rail fixed guideway system'' under 49 CFR Part 659, those rules, issued by the Federal Transit Administration (FTA), would apply to them.

Another connection to the general system sufficient to warrant FRA's exercise of jurisdiction is a railroad crossing at grade where the rapid transit operation and other railroad cross each other's tracks. In this situation, FRA will exercise its jurisdiction sufficiently to assure safe operations over the at-grade railroad crossing. FRA will also exercise jurisdiction to a limited extent over a rapid transit operation that, while not operated on the same tracks as the conventional railroad, is connected to the general system by virtue of operating in a shared right-of-way involving joint control of trains. For example, if a rapid transit line and freight railroad were to operate over a movable bridge and were subject to the same authority concerning its use (*e.g.*, the same tower operator controls trains of both operations), FRA will exercise jurisdiction in a manner sufficient to ensure safety at this point of connection. Also, where transit operations share highway-rail grade crossings with conventional railroads, FRA expects both systems to observe its signal rules. For example, FRA expects both railroads to observe the provision of its rule on grade crossing signals that requires prompt reports of warning system malfunctions. *See* 49 CFR part 234. FRA believes these connections present sufficient intermingling of the rapid transit and general system operations to pose significant hazards to one or both operations and, in the case of highway-rail grade crossings, to the motoring public. The safety of highway users of highway-rail grade crossings can best be protected if they get the same signals concerning the presence of any rail vehicles at the crossing and if they can react the same way to all rail vehicles.

RAPID TRANSIT CONNECTIONS NOT SUFFICIENT TO TRIGGER FRA'S EXERCISE OF JURISDICTION

Although FRA could exercise jurisdiction over a rapid transit operation based on any connection it has to the general railroad system, FRA believes there are certain connections that are too minimal to warrant the exercise of its jurisdiction. For example, a rapid transit system that has a switch for receiving shipments from the general system railroad is not one over which FRA would assert jurisdiction. This assumes that the switch is used only for that purpose. In that case, any entry onto the rapid transit line by the freight railroad would be for a very short distance and solely for the purpose of dropping off or picking up cars. In this situation, the rapid transit line is in the same situation as any shipper or consignee; without this sort of connection, it cannot receive or offer goods by rail.

Mere use of a common right-of-way or corridor in which the conventional railroad and rapid transit operation do not share any means of train control, have a rail crossing at grade, or operate over the same highway-rail grade crossings would not trigger FRA's exercise of jurisdiction. In this context, the presence of intrusion detection devices to alert one or both carriers to incursions by the other one would not be considered a means of common train control. These common rights of way are often designed so that the two systems function completely independently of each other. FRA and FTA will coordinate with rapid transit agencies and railroads wherever there are concerns about sufficient intrusion detection and related safety measures designed to avoid a collision between rapid transit trains and conventional equipment.

Where these very minimal connections exist, FRA will not exercise jurisdiction unless and until an emergency situation arises involving such a connection, which is a very unlikely event. However, if such a system is properly considered a rail fixed guideway system, FTA's rules (49 CFR part 659) will apply to it.

COORDINATION OF THE FRA AND FTA PROGRAMS

FTA's rules on rail fixed guideway systems (49 CFR part 659) apply to any rapid transit systems or portions thereof not subject to FRA's rules. On rapid transit systems that are not sufficiently connected to the general railroad system to warrant FRA's exercise of jurisdiction (as explained above), FTA's rules will apply exclusively. On those rapid

transit systems that are connected to the general system in such a way as warrant exercise of FRA's jurisdiction, only those portions of the rapid transit system that are connected to the general system will generally be subject to FRA's rules.

A rapid transit railroad may apply to FRA for a waiver of any FRA regulations. *See* 49 CFR part 211. FRA will seek FTA's views whenever a rapid transit operation petitions FRA for a waiver of its safety rules. In granting or denying any such waiver, FRA will make clear whether its rules do not apply to any segments of the operation so that it is clear where FTA's rules do apply.

EXTRAORDINARY REMEDIES

While civil penalties are the primary enforcement tool under the federal railroad safety laws, more extreme measures are available under certain circumstances. FRA has authority to issue orders directing compliance with the Federal Railroad Safety Act, the Hazardous Materials Transportation Act, the older safety statutes, or regulations issued under any of those statutes. *See* 45 U.S.C. 437(a) and (d), and 49 App. U.S.C. 1808(a). Such an order may issue only after notice and opportunity for a hearing in accordance with the procedures set forth in 49 CFR part 209, subpart C. FRA inspectors also have the authority to issue a special notice requiring repairs where a locomotive or freight car is unsafe for further service or where a segment of track does not meet the standards for the class at which the track is being operated. Such a special notice may be appealed to the regional director and the FRA Administrator. *See* 49 CFR part 216, subpart B.

FRA may, through the Attorney General, also seek injunctive relief in federal district court to restrain violations or enforce rules issued under the railroad safety laws. *See* 45 U.S.C. 439 and 49 App. U.S.C. 1810.

FRA also has the authority to issue, after notice and an opportunity for a hearing, an order prohibiting an individual from performing safety-sensitive functions in the rail industry for a specified period. This disqualification authority is exercised under procedures found at 49 CFR part 209, subpart D.

Criminal penalties are available for willful violations of the Hazardous Materials Transportation Act or its regulations. *See* 49 App. U.S.C. 1809(b), and 49 CFR 209.131, 133. Criminal penalties are also available under 45 U.S.C. 438(e) for knowingly and willfully falsifying, destroying, or failing to complete records or reports required to be kept under the various railroad safety statutes and regulations. The Accident Reports Act, 45 U.S.C. 39, also contains criminal penalties.

Perhaps FRA's most sweeping enforcement tool is its authority to issue emergency safety orders ''where an unsafe condition or practice, or a combination of unsafe conditions or practices, or both, create an emergency situation involving a hazard of death or injury to persons * * *'' 45 U.S.C. 432(a). After its issuance, such an order may be reviewed in a trial-type hearing. See 49 CFR 211.47 and 216.21 through 216.27. The emergency order authority is unique because it can be used to address unsafe conditions and practices whether or not they contravene an existing regulatory or statutory requirement. Given its extraordinary nature, FRA has used the emergency order authority sparingly.

[53 FR 52920, Dec. 29, 1988, as amended at 63 FR 11619, Mar. 10, 1998; 64 FR 62864, Nov. 17, 1999; 65 FR 42544, July 10, 2000]

APPENDIX B TO PART 209—FEDERAL RAILROAD ADMINISTRATION GUIDELINES FOR INITIAL HAZARDOUS MATERIALS ASSESSMENTS

These guidelines establish benchmarks to be used in determining initial civil penalty assessments for violations of the Hazardous Materials Regulations (HMR). The guideline penalty amounts reflect the best judgment of the FRA Office of Safety Assurance and Compliance (RRS) and of the Safety Law Division of the Office of Chief Counsel (RCC) on the relative severity, on a scale of $250 to $25,000, of the various violations routinely encountered by FRA inspectors. (49 U.S.C. 5123) Unless otherwise specified, the guideline amounts refer to average violations, that is, violations involving a hazardous material with a medium level of hazard, and a violator with an average compliance history. In an ''average violation,'' the respondent has committed the acts due to a failure to exercise reasonable care under the circumstances (''knowingly''). For some sections, the guidelines contain a breakdown according to relative severity of the violation, for example, the guidelines for shipping paper violations at 49 CFR §§172.200–.203. *All* penalties in these guidelines are subject to change depending upon the circumstances of the particular case. The general duty sections, for example §§173.1 and 174.7, are not ordinarily cited as separate violations; they are primarily used as explanatory citations to demonstrate applicability of a more specific section where applicability is otherwise unclear.

FRA believes that infractions of the regulations that lead to personal injury are especially serious; this is directly in line with Department of Transportation policy that hazardous materials are only safe for transportation when they are securely sealed in a proper package. (Some few containers, such as tank cars of carbon dioxide, are designed to vent off excess internal pressure. They are exceptions to the ''securely sealed'' rule.) ''Personal injury'' has become somewhat of a

term of art, especially in the fields of occupational safety and of accident reporting. To avoid confusion, these penalty guidelines use the notion of ''human contact'' to trigger penalty aggravation. In essence, *any* contact by a hazardous material on a person during transportation is a per se injury and proof will not be required regarding the extent of the physical contact or its consequences. When a violation of the Hazardous Materials Regulations *causes* a death or serious injury, the maximum penalty of $25,000 shall always be assessed initially.

These guidelines are a preliminary assessment tool for FRA's use. They create no rights in any party. FRA is free to vary from them when it deems appropriate and may amend them from time to time without prior notice. Moreover, FRA is not bound by any amount it initially proposes should litigation become necessary. In fact, FRA reserves the express authority to amend the NOPV to seek a penalty of up to $25,000 for each violation at any time prior to issuance of an order.

PENALTY ASSESSMENT GUIDELINES

Emergency orders		Guideline
EO16	Penalties for violations of EO16 vary depending on the circumstances	5,000
EO17	Penalties for violations of EO17 vary depending on the circumstances	[1]
	Failure to file annual report	5,000

[1] Varies.

PENALTY ASSESSMENT GUIDELINES

49 CFR section	Description	Guideline
	PART 107	
107.608	Failure to register or to renew registration. (Note: registration—or renewal—is mitigation.).	1,000
	PART 171	
171.2(c)	Representing (marking, certifying, selling, or offering) a packaging as meeting regulatory specification when it does not.	8,000
171.2(f)(2)	Billing, marking, etc. for the presence of HM when no HM is present. (Mitigation required for shipments smaller than a carload, i.e., single drum penalty is 1,000).	2,000
171.12	Import shipments—Importer not providing shipper and forwarding agent with US requirements. Cannot be based on inference.	4,000
	Import shipments—Failure to certify by shipper or forwarding agent	2,000
171.15	Failure to provide immediate notice of certain hazardous materials incidents.	6,000
171.16	Failure to file incident report (form DOT 5800.1). (Note: Multiple failures will aggravate the penalty; see the expert attorney.).	4,000
	PART 172	
Shipping Papers:		
172.200—.203	Offering hazardous materials for transportation when the material is not properly described on the shipping paper as required by §§ 172.200—.203. (The ''shipping paper'' is the document tendered by the shipper/offeror to the carrier. The original shipping paper contains the shipper's certification at § 172.204.).	
	—Information on the shipping paper is wrong to the extent that it caused or materially contributed to a reaction by emergency responders that aggravated the situation or caused or materially contributed to improper handling by the carrier that led to or materially contributed to a product release.	15,000
	—Total lack of hazardous materials information on shipping paper. (Some shipping names alone contain sufficient information to reduce the guideline to the next lower level, but they may be such dangerous products that aggravation needs to be considered.).	7,500
	—Some information is present but the missing or improper description could cause mishandling by the carrier or a delay or error in emergency response.	5,000
	—When the improper description is not likely to cause serious problem (technical defect).	2,000
	—Shipping paper includes a hazardous materials description and no hazardous materials are present.	7,500

PENALTY ASSESSMENT GUIDELINES—Continued

49 CFR section	Description	Guideline
	Note: Failure to include emergency response information is covered at §§172.600–604; while the normal unit of violation for shipping papers is the whole document, failure to provide emergency response information *is* a separate violation.	
172.204	Shipper's failure to certify	2,000
172.205	Hazardous waste manifest. (Applies only to defects in the Hazardous Waste Manifest form [EPA Form 8700–22 and 8700–22A]; shipping paper defects are cited and penalized under §172.200–.203.).	4,000
Marking	The guidelines for ''marking'' violations contemplate a total lack of the prescribed mark. Obviously, where the package (including a whole car) is partially marked, mitigation should be applied.	
172.301	Failure to mark a non-bulk package as required (e.g., no commodity name on a 55-gallon drum). (Shipment is the unit of violation.).	1,000
172.302	Failure to follow standards for marking bulk packaging. (Note: If a more specific section applies, cite it and its penalty guideline.).	2,000
172.302(a)	ID number missing or in improper location. (The guideline is for a portable tank; for smaller bulk packages, the guideline should be mitigated downward.).	2,500
172.302(b)	Failure to use the correct *size* of markings. (Note: If §172.326(a) is also cited, it takes precedence and .302(b) is not cited. Note also: the guideline is for a gross violation of marking size—½″ where 2″ is required—and mitigation should be considered for markings approaching the required size.).	2,000
172.302(c)	Failure to place exemption number markings on bulk package	2,000
172.303	Prohibited marking. (Package is marked for a hazardous material and contains either another hazardous material or no hazardous material.)	
	—The marking is wrong and caused or contributed to a wrong emergency response.	10,000
	—Inconsistent marking; e.g., Shipping name and ID number do not agree	5,000
	—Marked as a hazardous material when package does not contain a hazardous material.	2,000
172.313	''Inhalation Hazard'' not marked	2,500
172.322	Failure to mark for MARINE POLLUTANT where required	1,500
172.325(a)	Improper, or missing, HOT mark for elevated temperature material	1,500
172.326(a)	Failure to mark a portable tank with the commodity name	2,500
172.326(b)	Owner's/lessee's name not displayed	500
172.326(c)	Failure to mark portable tank with ID number	2,500
172.330(a)(1)(i)	Offering/transporting hazardous materials in a tank car that does not have the required shipping name or common name stenciled on the car; include reference to section requiring stenciling, such as §173.314(b) (5) or (6).	2,500
172.330(a)(1)(ii)	Offering/transporting hazardous materials in a tank car that does not have the required ID number displayed on the car.	2,500
172.331(b)	Offering bulk packaging other than a portable tank, cargo tank, or tank car (e.g., a hopper car) not marked with UN/NA number. (I.e., a hopper car carrying a hazardous substance, where a placard is not required).	2,500
172.332	Improper display of identification number markings. Note: Citation of this section and §§172.326 (portable tanks), 172.328 (cargo tanks), or 172.330 (tank cars) does not create two separate violations.	2,000
172.334(a)	Displaying ID numbers on a RADIOACTIVE, EXPLOSIVES 1.1,1.2,1.3,1.4,1.5, or 1.6, or DANGEROUS, or subsidiary hazard placard.	4,000
172.334(b)	—Improper display of ID number that caused or contributed to a wrong emergency response.	15,000
	—Improper display of ID number that could cause carrier mishandling or minor error in emergency response.	5,000
	—Technical error	2,000
172.334(f)	Displaying ID number on orange panel not in proximity to the placard	1,500
Labeling:		
172.400–.450	Failure to label properly. (See also §172.301 regarding the marking of packages.).	2,500
Placarding	The guidelines for ''placarding'' violations contemplate a total lack of the prescribed placard. Obviously, where the package (including a whole car) is partially placarded, mitigation should be applied.	
172.502	—Placarded as hazardous material when car does not contain a hazardous material.	2,000
	—Placard does not represent hazard of the contents	2,000
	—Display of sign or device that could be confused with regulatory placard. Photograph or good, clear description necessary.	2,000
172.503	Improper display of ID number on placards. (Note: Do not cite this section; cite §172.334.).	[1]

PENALTY ASSESSMENT GUIDELINES—Continued

49 CFR section	Description	Guideline
172.504(a)	Failure to placard; affixing or displaying wrong placard. (See also §§172.502(a), 172.504(a), 172.505, 172.510(c), 172.516, 174.33, 174.59, 174.69; all applicable sections should be cited, but the penalty should be set at the amount for the violation most directly in point.) (Generally, the car is the unit of violation, and penalties vary with the number of errors, typically at the rate of $1,000 per placard.)	
	—Complete failure to placard	7,500
	—One placard missing (add $1,000 per missing placard up to a total of three; then use the guideline above).	1,000
	— Complete failure to placard, but only 2 placards are required (e.g., intermediate bulk containers [IBCs]).	2,500
172.504(b)	Improper use of DANGEROUS placard for mixed loads	5,000
172.504(c)	Placarded for wrong hazard class when no placard was required due to 1,001 pound exemption.	2,000
172.504(e)	Use of placard other than as specified in the table:	
	—Improper placard caused or contributed to improper reaction by emergency response forces or caused or contributed to improper handling by carrier that led to a product release.	15,000
	—Improper placard that could cause improper emergency response or handling by carrier.	5,000
	—Technical violation	2,500
172.505	Improper application of placards for subsidiary hazards. (Note: This is in addition to any violation on the primary hazard placards.).	5,000
172.508(a)	Offering hazardous material for rail transportation without affixing placards. (Note: The preferred section for a total failure to placard is 172.504(a); only one section should be cited to avoid a dual penalty.) (Note also: Persons offering hazardous materials for rail movement must *affix* placards; if offering for highway movement, the placards must be *tendered* to the carrier. §172.506.).	7,500
	Placards OK, except they were IMDG labels instead of 10″ placards. (Unit of violation is the packaging, usually a portable tank.).	500
	Placards on TOFC/COFC units not readily visible. (Note: Do not cite this section, cite §172.516 instead.).	(2)
172.508(b)	Accepting hazardous material for rail transportation without placards affixed.	5,000
172.510(a)	EXPLOSIVES 1.1, EXPLOSIVES 1.2, POISON GAS, POISON GAS-RESIDUE, (Division 2.3, Hazard Zone A), POISON, or POISON-RESIDUE (Division 6.1, Packing Group I, Hazard Zone A) placards displayed without square background.	5,000
172.510(c)	Improper use of RESIDUE placard.	
	—Placarded RESIDUE when loaded	4,000
	—Placarded loaded when car contains only a residue	1,000
	—Placarded EMPTY when RESIDUE is required	500
172.514	Improper placarding of bulk packaging other than a tank car: For the ''exception'' packages in 174.514(c). Note: Use the regular placarding sections for the guideline amounts for larger bulk packages.	2,000
172.516	Placard not readily visible, improperly located or displayed, or deteriorated. Good color photos ''essential'' to prove deterioration, and considerable weathering is permissible. Placard is the unit of violation.	1,000
	—When placards on an intermodal container are not visible, for instance, because the container is in a well car. Container is the unit of violation, and, as a matter of enforcement policy, FRA accepts the lack of visibility of the end placards.	2,000
Emergency Response Information	Violations of §§172.600–.604 are in addition to shipping paper violations. In citing a carrier, if the railroad's practice is to carry an emergency response book or to put the E/R information as an attachment to the consist, the unit of violation is generally the train (or the consist). ''Telephone number'' violations are generally best cited against the shipper; if against a railroad, there should be proof that the number was given to the railroad, that is, it was on the original shipping document.	
172.600–.602	Where improper emergency response information has caused an improper reaction from emergency forces and the improper response has aggravated the situation. Note: Proof of this will be rigorous. For instance, if the emergency response forces had chemical information with the correct response and they relied, instead, on shipper/carrier information to their detriment; the $15,000 penalty guideline applies.	15,000
	Bad, missing, or improper emergency response information. (Be careful in transmitting violations of this section against a railroad; there are many sources of E/R information and it does not necessarily ''travel'' with the shipping documents.).	4,000
172.602(c)	Failure to have emergency response information ''immediately accessible''	15,000
172.604	Improper or missing emergency response telephone number	2,500

PENALTY ASSESSMENT GUIDELINES—Continued

49 CFR section	Description	Guideline
Training:		
172.702(a)	General failure to train hazmat employees	5,000
172.702(b)	Hazmat employee performing covered function without training. (Unit of violation is the employee; see the expert attorney if more than 10 employees are involved.).	1,000
172.704(a)	Failure to train in the required areas: —General awareness/familiarization —Function-specific —Safety (Unit of violation is the ''area,'' and, for a total failure to train, cite 172.702(a) and use that penalty instead of 172.704.)	2,500
172.704(c)	Initial and recurrent training. (Note: Cite this and the relevant substantive section, e.g., 172.702(a), and use penalty provided there.).	[3]
172.704(d)	Failure to maintain record of training. (Unit of violation is the record.)	2,500
	PART 173	
173.1	General duty section applicable to shippers; also includes subparagraph (b), the requirement to train employees about applicable regulations. (Cite the appropriate section in the 172.700–.704 series for training violations.).	2,000
173.9(a)	Early delivery of transport vehicle that has been fumigated. (48 hours must have elapsed since fumigation.).	5,000
173.9(b)	Failure to display fumigation placard. (Ordinarily cited against shipper only, not against railroad.).	1,000
173.10	Delivery requirements for gases and for flammable liquids. See also 174.204 and 174.304.	3,000
173.22	Shipper responsibility: This general duty section should ordinarily be cited only to support a more specific charge.	[4]
173.22a	Improper use of packagings authorized under exemption	2,500
	Failure to maintain copy of exemption as required.	1,000
173.24(b)(1) & 173.24(b)(2) and 173.24(f)(1) & 173.24(f)(1)(ii).	Securing closures: These subsections are the general ''no leak'' standard for all packagings. §173.24(b) deals primarily with *packaging* as a whole, while §173.24(f) focuses on *closures.* Cite the sections accordingly, using both the leak/non-leak criteria and the package size considerations to reach the appropriate penalty. Any actual leak will aggravate the guideline by, typically, 50%; a leak with contact with a human being will aggravate by at least 100%, up to the maximum of $25,000 if the HMR violation *causes* the injury. With tank cars, §173.31(b) applies, and IM portable tanks [§173.32c], and other tanks of that size range, should use the tank car penalty amounts, stated in reference to that section.	
	—Small bottle or box	1,000
	—55-gallon drum	2,500
	—Larger container, e.g., IBC; not portable tank or tank car	5,000
173.24(c)	Use of package not meeting specifications, including required stencils and markings. The most specific section for the package involved should be cited (see below). The penalty guideline should be adjusted for the size of the container. Any actual leak will aggravate the guideline by, typically, 50%; a leak with contact with a human being will aggravate by at least 100%, up to the maximum of $25,000 if the HMR violation *causes* the injury.	
	—Small bottle or box	1,000
	—55-gallon drum	2,500
	—Larger container, e.g., IBC; not portable tank or tank car	5,000
	For more specific sections: Tank cars—§173.31(a), portable tanks—§173.32, and IM portable tanks—§§173.32a, .32b, and .32c, q.v	
173.24a(a)(3)	Non-bulk packagings: Failure to secure and cushion inner packagings	1,000
	—Causes leak	3,000
	—Leak with any contact between product and any human being	10,000
173.24a(b)&(d)	Non-bulk packagings: Exceeding filling limits	1,000
	—Causes leak	3,000
	—Leak with any contact between product and any human being	10,000
173.24b(a)	Insufficient outage: —<1%	3,000
	—Causes leak	5,000
	—Leak with any contact between product and any human being	10,000
173.24b(a)(3)	Outage <5% on PIH material	5,000
	—Causes leak	7,500
	—Leak with any contact between product and any human being	10,000

PENALTY ASSESSMENT GUIDELINES—Continued

49 CFR section	Description	Guideline
173.26	Loaded beyond gross weight or capacity as stated in specification. (Applies only if quantity limitations do not appear in packaging requirements of Part 173.).	5,000
173.28	Improper reuse, reconditioning, or remanufacture of packagings.	1,000
173.29(a)	Offering residue tank car for transportation when openings are not tightly closed (§ 174.67(k) is also usually applicable). The regulation requires offering ''in the same manner as when'' loaded and may be cited when a car not meeting specifications (see § 173.31(a)(1)) is released back into transportation after unloading; same guideline amount. Guidelines vary with the type of commodity involved:	
	—Hazardous material with insignificant vapor pressure and without classification as ''poison'' or ''inhalation hazard''.	2,000
	—With actual leak	5,000
	—With leak allowing the product to contact any human being	15,000
	—Hazardous material with vapor pressure (essentially any gas or compressed gas) and/or with classification as ''poison'' or ''inhalation hazard.''.	5,000
	—With actual leak	7,500
	—With leak allowing the product (or fumes or vapors) to contact any human being. (In the case of fumes, the ''contact'' must be substantial.).	15,000
	—Where only violation is failure to secure a protective housing, e.g., the covering for the gaging device.	1,000
173.30	A general duty section that should be cited with the explicit statement of the duty.	
173.31(a)(1)	Use of a tank car not meeting specifications and the ''Bulk packaging'' authorization in Column 8 of the § 172.101 Hazardous Materials Table reference is:	
	§ 173.240	1,000
	§ 173.241	2,500
	§ 173.242	5,000
	§ 173.243	5,000
	§ 173.244	7,500
	§ 173.245	7,500
	§ 173.247	1,000
	§ 173.314, .315	5,000
	—Minor defect not affecting the ability of the package to contain a hazardous material, e.g., no chain on a bottom outlet closure plug.	500
	Tank meets specification, but specification is not stenciled on car. Note: § 179.1(e) implies that only the builder has the duty here, but it is the presence of the stencil that gives the shipper the right to rely on the builder. (See § 173.22(a)(3).).	1,000
	Tank car not stenciled ''Not for flammable liquids,'' and it should be. (AAR Tank Car Manual, Appendix C, C3.03(a)5.)	
	—Most cars	2,500
	—Molten sulfur car	500
	—If flammable liquid is actually in the car	5,000
173.31(a)(4)	Use of a tank car stenciled for one commodity to transport another	5,000
173.31(a)(5)	Use of DOT-specification tank car without shelf couplers. (Note: prior to November 15, 1992, this did not apply to a car not carrying hazardous materials.).	10,000
	—Against a carrier, cite § 174.3 and this section	6,000
173.31(a)(6)	Use of non-DOT specification car without shelf couplers to carry hazardous materials. (Applies only since November 15, 1990.).	10,000
	—Against a carrier, cite § 174.3 and this section	6,000
173.31(a)(7)	Use of tank car without air brake support attachments welded to pads. (Effective July 1, 1991).	5,000
173.31(a)(15)	Tank car with nonreclosing pressure relief device used to transport Class 2 gases, Class 3 or 4 liquids, or Division 6.1 liquids, PG I or II.	7,500
173.31(a)(17)	Tank car with interior heating coils used to transport Division 2.3 or Division 6.1, PG I, based on inhalation toxicity.	7,500
173.31(b)(1), 173.31(b)(3)	Shipper failure to determine (to the extent practicable) that tank, safety appurtenances, and fittings are in proper condition for transportation; failure to properly secure closures. (Sections 173.31(b)(1) & .31(b)(3), often cited as together for loose closure violations, are taken as one violation.) The unit of violation is the car, aggravated if necessary for truly egregious condition. Sections 173.24(b) & (f) establish a ''no-leak'' design standard, and 173.31 imposes that standard on operations.	5,000
	—With actual leak of product	10,000
	—With actual leak allowing the product (or fumes or vapors) to contact any human being. (With safety *vent,* be careful because carrier might be at fault.).	15,000

PENALTY ASSESSMENT GUIDELINES—Continued

49 CFR section	Description	Guideline
	—Minor violation, e.g., bottom outlet cap loose on tank car of molten sulfur (because product is a solid when shipped).	1,000
	—Failure (.31(b)(1)) to have bottom outlet cap off during loading	1,000
173.31(b)(4)	Filling and offering for transportation a tank car overdue for retest of tank, interior heater system, and/or safety relief valve. Note that the car may be filled while in-date, held, and then shipped out-of-date. (Adjust penalty if less than one month or more than one year overdue.).	6,000
173.31(c)(1)	Tank, interior heater system, and/or safety valve overdue for retest. If these conditions exist, the violation is of §173.31(b)(4). If the violation is for improperly conducting the test(s), see the expert attorney.	
173.31(c)(10)	Failure to properly stencil a retest that was performed	1,000
173.32c	Loose closures on an IM portable tank (§173.24 establishes the ''tight closure'' standard; §172.32c applies it to IM portable tanks.) (The scale of penalties is the same as for tank cars.).	5,000
	—With actual leak of product	10,000
	—With actual leak and human being contact	15,000
	—Minor violation	1,000
173.314(b)(5)	No commodity stencil, compressed gas tank car. (See also §172.330)	2,500
173.314(c)	Compressed gas loaded in excess of filling density (same basic concept as insufficient outage).	6,000
	—''T'' car with excessive voids in the thermal coating, such that the car no longer complies with the DOT specification. Section 173.31(a)(1) requires tank cars used to transport hazardous materials to meet the requirements of the applicable specification and this section (§173..314(c)) lists 112T/114T cars as allowed for compressed gases.	5,000
	PART 174	
General Requirements:		
174.3	Acceptance of improperly prepared shipment. This general duty section must be accompanied by a citation to the specific section violated.	
174.7	Carrier's failure to instruct employees; cannot be based on inference; §§172.700-.704 are preferred citations.	[5]
174.8(b)	—Failure to inspect hazardous materials (and adjacent) cars at point where train is required to be inspected. (Unit of violation is the train.) (Note: For all ''failure to inspect'' citations, the mere presence of a nonconforming condition does not *prove* a failure to inspect.).	4,000
	—Allowing unsafe loaded placarded car to continue in transportation beyond point where inspection was required). (Unit of violation is the car.).	8,000
	—Failure to determine whether placards are in place and conform to shipping papers (at a required inspection point). (Unit of violation is the car.).	5,000
174.9(a)	Failure to properly inspect loaded, placarded tank car at origin or interchange.	4,000
174.9(b)	Loose or insecure closures on tank car containing a residue of a hazardous material. (FRA policy is that, against a railroad, this violation must be observable from the ground because, for reasons of safety, railroad inspectors do not climb on cars absent an indication of a leak.).	1,000
174.9(c)	Failure to ''card'' a tank car overdue for tank retest	3,000
174.10(c)	Offering a noncomplying shipment in interchange	3,000
174.10(d)	Offering leaking car of hazardous materials in interchange	10,000
174.12	Improper performance of intermediate shipper/carrier duties; applies to forwarders and highway carriers delivering TOFC/COFC shipments to railroads.	3,000
174.14	Failure to expedite: violation of ''48-hour rule.'' Note: does not apply to cars ''held short'' of destination or constructively placed.	1,000
General Operating Requirements	Note: This subpart (Subpart B) of Part 174 has three sections referring to shipment documentation: §174.24 relating to *accepting* documents, §174.25 relating to the *preparation* of movement documents, and §174.26 relating to movement documents in the *possession* of the train crew. Only the most relevant section should be cited. In most cases, the unit of violation is the shipment, although where a unified consist is used to give notice to the crew, there is some justification for making it the train, especially where the discrepancy was generated using automated data processing and the error is repetitious.	

PENALTY ASSESSMENT GUIDELINES—Continued

49 CFR section	Description	Guideline
174.24	Accepting hazardous materials shipment without properly prepared shipping paper. (Note: The carrier's duty extends only to the document received, that is, a shipment of hazardous materials in an unplacarded transport vehicle with a shipping paper showing other than a hazardous material is not a violation against the carrier unless knowledge of the contents of the vehicle is proved. Likewise, receipt of a tank car placarded for Class 3 with a shipping paper indicating a flammable liquid does not create a carrier violation if the car, in fact, contains a corrosive. On the other hand, receipt of a placarded trailer with a shipping paper listing only FAK (''freight-all-kinds''), imposes a duty on the carrier to inquire further and to reject the shipment if it is improperly billed.)	
	—Improper hazardous materials information that could cause delay or error in emergency response.	7,500
	—Total absence of hazardous materials information	5,000
	—Technical errors, not likely to cause problems, especially with emergency response.	1,000
	—Minor errors not relating to hazardous materials emergency response, e.g., not listing an exemption number and the exemption is not one affecting emergency response.	500
174.25	Preparing improper movement documents. (Similar to the requirements in §174.24, here the carrier is held responsible for preparing a movement document that accurately reflects the shipping paper tendered to it. With no hazardous materials information on the shipper's bill of lading, the carrier is not in violation—absent knowledge of hazardous contents—for preparing a nonhazardous movement document. While ''movement documents'' in the rail industry used to be waybills or switch tickets (almost exclusively), carriers are now incorporating the essential information into a consist, expanded from its former role as merely a listing of the cars in the train.)	
	—Information on the movement document is wrong to the extent that it actually caused or materially contributed to a reaction by emergency responders that aggravated the situation or caused or materially contributed to improper handling by the carrier that led to or materially contributed to a product release.	15,000
	—Total lack of hazardous materials information on movement document. (Some shipping names alone contain sufficient information to reduce the guideline to the next lower level, but they may be such dangerous products that aggravation needs to be considered.).	7,500
	—Some information is present, but the missing or improper description could cause mishandling by the carrier or a delay or error in emergency response, including missing RESIDUE description required by §174.25(c).	5,000
	—Missing/improper *endorsement,* unless on a switch ticket as allowed under §174.25(b).	3,500
	—Movement document does not indicate, for a flatcar carrying trailers or containers, which trailers or containers contain hazardous materials. (If all trailers or containers on the flatcar contain hazardous materials, there is no violation.).	2,500
	—When the improper description is not likely to cause serious problem (technical defect).	1,000
	—Minor errors not related to hazardous materials emergency response, e.g., not listing an exemption number and the exemption is not one affecting emergency response.	500
	Note: Failure to include emergency response information is covered at §172.600–604; while the normal unit of violation for movement documents is the whole document, failure to provide emergency response information *is* a separate violation.	
174.26(a)	Failure to execute the required POISON GAS and EXPLOSIVES 1.1/1.2 notices. (The notice is the unit of violation, because one notice can cover several shipments.).	5,000
	Failure to deliver the required POISON GAS and EXPLOSIVES 1.1/1.2 notices to train and engine crew. (Cite this, or the above, as appropriate.).	5,000
	Failure to transfer notice from crew to crew. (Note that this is very likely an individual liability situation; the penalty guideline listed here, however, presumes action against a railroad.).	3,000
	Failure to keep copy of notice on file	1,000
174.26(b)	Train crew does not have a document indicating position in train of each loaded, placarded car. Aggravate by 50% for Poison Gas, 2.3, and Explosives, 1.1 and 1.2. (Train is the unit of violation.).	6,000

PENALTY ASSESSMENT GUIDELINES—Continued

49 CFR section	Description	Guideline
	—Technical violation, e.g., car is listed in correct *relative* order, but not in exact numerical order, usually because of addition of car or cars to head *or* tail of train. (Note: Applies only if the *actual* location is off by 10 or fewer cars.).	1,000
174.26(c)	Improper paperwork in possession of train crew. (If the investigation of an accident reveals a violation of this section and §174.25, cite this section.) (Shipment is unit of violation, although there is justification for making it the train if a unified consist is used to carry this information and the violation is a pattern one throughout all, or almost all, of the hazardous materials shipments. For intermodal traffic, ''shipment'' can mean the container or trailer—e.g., a UPS trailer with several non-disclosed hazardous materials packages would be one unit.)	
	—Information on the document possessed by the train crew is wrong to the extent that it caused or materially contributed to a reaction by emergency responders that aggravated the situation or caused or materially contributed to improper handling by the carrier that led to or materially contributed to a product release.	15,000
	—Total lack of hazardous materials information on movement document. (Some shipping names alone contain sufficient information to reduce the guideline to the next lower level, but they may be such dangerous products that aggravation needs to be considered.).	7,500
	—Some information is present but the error(s) could cause mishandling by the carrier or a delay or error in emergency response. Includes missing RESIDUE description required by §174.25(c).	5,000
	—Improper information, but the hazardous materials are small shipments (e.g., UPS moves) and PG III (e.g., the ''low hazard'' materials allowed in TOFC/COFC service without an exemption since HM–197).	3,500
	—Technical defect not likely to cause delay or error in emergency response or carrier handling.	1,000
	—Minor error not relating to emergency response or carrier handling, e.g., not listing the exemption number on document and the exemption is not one affecting emergency response.	500
174.33	—Failure to maintain ''an adequate supply of placards.'' [The violation is for ''failure to replace''; if missing placards are replaced, the supply is obviously adequate, if not, failure to have a placard is not a separate violation from failure to replace it.]	
	—Failure to replace lost or destroyed placards based on shipping paper information. (This is in addition to the basic placarding mistakes in, for instance, §172.504.).	1,000
	Note: A railroad's placarding duties are to *not* accept a car without placards [§172.508(b)]; to maintain an ''adequate supply'' of placards and to replace them based on shipping paper information [§174.33]; and to *not* transport a car without placards [§174.59]. At each inspection point, a railroad must determine that all placards are in place. [§172.8(b)] The ''next inspection point'' replacement requirement in §174.59, q.v., refers to placards that disappear *between* inspection points; a car *at* an inspection point must be placarded because it is in transportation, even if held up at that point. [49 U.S.C. 5102(12)]	
174.45	Failure to report hazardous materials accidents or incidents. Cite §§171.15 or 171.16 as appropriate.	
174.50	Moving leaking tank car unnecessarily	7,500
	Failure to stencil leaking tank car	3,500
	Loss of product resulted in human being contact *because* of improper carrier handling.	15,000
174.55	Failure to block and brace as prescribed. (See also §§174.61, .63, .101, .112, .115; where these more specific sections apply, cite them.) Note: The regulatory requirement is that hazardous materials packages be loaded and securely blocked and braced to prevent the packages from changing position, falling to the floor, or sliding into each other. If the load is tight and secure, pieces of lumber or other materials may not be necessary to achieve the ''tight load'' requirement. Be careful on these and consult freely with the expert attorney and specialists in the Hazardous Materials Division.	
	—General failure to block and brace	5,000
	—Inadequate blocking and bracing (an attempt was made but blocking/bracing was insufficient.).	2,500
	—Inadequate blocking and bracing leading to a leak	7,500
	—Inadequate blocking and bracing leading to a leak and human being contact.	15,000

PENALTY ASSESSMENT GUIDELINES—Continued

49 CFR section	Description	Guideline
174.59	Marking and placarding. Note: As stated elsewhere, a railroad's placarding duties are to *not* accept a car without placards [§ 172.508(b)], to maintain an ''adequate supply'' of placards and to replace them based on shipping paper information [§ 174.33], and to *not* transport a car without placards [§ 174.59]. At each inspection point, a railroad must determine that all placards are in place. [§ 172.8(b)] The ''next inspection point'' replacement requirement in this section refers to placards that disappear *between* inspection points. A car *at* an inspection point must be placarded because it is in transportation [49 U.S.C. 5102(12)], even if held up at that point. Because the statute creates civil penalty liability only if a violation is ''knowing,'' that is, ''a reasonable person knew or should have known that an act performed by him was in violation of the HMR,'' and because railroads are not under a duty to inspect hazardous materials cars merely standing in a yard, violations written for unplacarded cars in yards must include proof that the railroad knew about the unplacarded cars and took no corrective action within a reasonable time. (Note also that the real problem with unplacarded cars in a railyard may be a lack of emergency response information, §§ 172.600–.604, and investigation may reveal that those sections should be cited instead of this one.)	
	—Complete failure to placard	7,500
	—One placard missing (add $1,000 per missing placard up to a total of three; then use the guideline above).	1,000
	For other placarding violations, see §§ 172.500–.560 and determine if one of them more correctly states the violation.	
174.61	Improper transportation of transport vehicle or freight container on flat car. (Note: If improper lading restraint is the violation, see § 174.55; if improper restraint of a bulk packaging inside a closed transport vehicle is the violation, see § 174.63(b).).	3,000
174.63(a) & (c)	—Improper transportation of portable tank or other bulk packaging in TOFC/COFC service.	3,000
	—Improper transportation leading to a release of product	7,500
	—Improper transportation leading to a release and human being contact	15,000
174.63(b)	Improper securement of bulk packaging inside enclosed transport vehicle or freight container.	
	—General failure to secure	5,000
	—Inadequate securement (an attempt to secure was made but the means of securement were inadequate).	2,500
	—Inadequate securement leading to a leak	7,500
	—Inadequate securement leading to a leak and human being contact	15,000
174.63(e)	Transportation of cargo tank or multi-unit tank car tank without authorization and in the absence of an emergency.	7,500
174.67(a)(1)	Tank car unloading operations performed by persons not properly instructed (case cannot be based on inference).	2,500
174.67(a)(2)	Unloading without brakes set and/or wheels blocked. (The enforcement standard, as per 1995 Hazardous Materials Technical Resolution Committee, is that sufficient handbrakes must be applied on one or more cars to prevent movement and each car with a handbrake set must be blocked in both directions. The unloading facility must make a determination on how many brakes to set.)	
	—No brakes set, no wheels blocked, or fewer brakes set/wheels blocked than facility's operating plan.	5,000
	—No brakes set, but wheels blocked	3,000
	—Brakes set, but wheels not blocked	4,000
174.67(a)(3)	Unloading without cautions signs properly displayed. (See Part 218, Subpart B).	2,000
174.67(c)(2)	Failure to use non-metallic block to prop manway cover open while unloading through bottom outlet.	
	—Flammable or combustible liquid, or other product with a vapor flash point hazard.	3,000
	—Material with no vapor flammability hazard	500
174.67(h)	Insecure unloading connections, such that product is actually leaking	10,000
174.67(i)	Unattended unloading	5,000
174.67(j)	Discontinued unloading without disconnecting all unloading connections, tightening valves, and applying closures to all other openings. (Note: If the car is attended, this subsection does not apply.).	2,000
174.67(k)	Preparation of car after unloading: Removal of unloading connections is required, as is the closing of *all* openings with a ''suitable tool.'' Note: This subsection requires unloading connections to be ''removed'' when unloading is complete, § 174.67(j) requires them to be ''disconnected'' for a temporary cessation of unloading. The penalties recommended here mirror those in § 173.29, dealing with insecure closures generally.	

PENALTY ASSESSMENT GUIDELINES—Continued

49 CFR section	Description	Guideline
	—Hazardous material with insignificant vapor pressure and without classification as ''poison'' or ''inhalation hazard''.	2,000
	—With actual leak	5,000
	—With leak allowing the product to contact any human being	15,000
	—Hazardous material with vapor pressure (essentially any gas or compressed gas) and/or with classification as ''poison'' or ''inhalation hazard''.	5,000
	—With actual leak	7,500
	—With leak allowing the product (or fumes or vapors) to contact any human being). Note: Contact with fumes must be substantial.	15,000
174.69	—Complete failure to remove loaded placards and replace with RESIDUE placard on tank cars.	6,000
	—Partial failure. (Unit of violation is the placard; the guideline is used for each placard up to 3, then the penalty above is applicable.).	1,000
174.81	—Failure to obey segregation requirements for materials forbidden to be stored or transported together. (''X'' in the table).	6,000
	—Failure to obey segregation requirements for materials that must be separated to prevent commingling in the event of a leak. (''O'' in the table).	4,000
174.83(a)	Improper switching of placarded rail cars	5,000
174.83(b)	Improper switching of loaded rail car containing Division 1.1/1.2, 2.3 PG I Zone A, or Division 6.1 PG I Zone A, or DOT 113 tank car placarded for 2.1.	8,000
174.83(c)–(e)	Improper switching of placarded flatcar	5,000
174.83(f)	Switching Division 1.1/1.2 without a buffer car or placement of Division 1.1/1.2 car under a bridge or alongside a passenger train or platform.	8,000
174.84	Improper handling of Division 1.1/1.2, 2.3 PG I Zone A, 6.1 PG I Zone A in relation to guard or escort cars.	4,000
174.85	Improper Train Placement (The unit of violation under this section is the car. Where more than one placarded car is involved, e.g., if 2 placarded cars are too close to the engine, both are violations. Where both have a similar violation, e.g., a Division 1.1 car next to a loaded tank car of a Class 3 material, each car gets the appropriate penalty as listed below.)	
	RESIDUE car without at least 1 buffer from engine or occupied caboose	3,000
	Placard Group 1—Division 1.1/1.2 (Class A explosive) materials	
	—Fewer than 6 cars (where train length permits) from engine or occupied caboose.	8,000
	—As above but with at least 1 buffer	7,000
	—No buffer at all (where train length doesn't permit 5)	8,000
	—Next to open top car with lading beyond car ends or, if shifted, would be beyond car ends.	7,000
	—Next to loaded flat car, except closed TOFC/COFC equipment, auto carriers, specially equipped car with tie-down devices, or car with permanent bulkhead.	6,000
	—Next to operating temperature-control equipment or internal combustion engine in operation.	7,000
	—Next to placarded car, except one from same placard group or COMBUSTIBLE.	7,000
	Placard Group 2—Division 1.3/1.4/1.5 (Class B and C explosives); Class 2 (compressed gas, other than Division 2.3, PG 1 Zone A; Class 3 (flammable liquids); Class 4 (flammable solid); Class 5 (oxidizing materials); Class 6, (poisonous liquids), except 6.1 PG 1 Zone A; Class 8 (corrosive materials).	
	For tank cars:	
	—Fewer than 6 cars (where train length permits) from engine or occupied caboose.	6,000
	—As above but with at least 1 buffer	5,000
	No buffer at all (where train length doesn't permit 5)	6,000
	—Next to open top car with lading beyond car ends or, if shifted, would be beyond car ends.	5,000
	—Next to loaded flat car, except closed TOFC/COFC equipment, auto carriers, specially equipped car with tie-down devices, or car with permanent bulkhead.	4,000
	—Next to operating temperature-control equipment or internal combustion engine in operation.	5,000
	—Next to placarded car, except one from same placard group or COMBUSTIBLE.	5,000
	For other rail cars:	
	—Next to placarded car, except one from same placard group or COMBUSTIBLE.	5,000
	Placard Group 3—Divisions 2.3 (PG 1 Zone A; poisonous gases) and 6.1 (PG 1 Zone A; poisonous materials)	

PENALTY ASSESSMENT GUIDELINES—Continued

49 CFR section	Description	Guideline
	For tank cars:	
	—Fewer than 6 cars (where train length permits) from engine or occupied caboose.	8,000
	—As above but with at least 1 buffer	7,000
	No buffer at all (where train length doesn't permit 5)	8,000
	—Next to open top car with lading beyond car ends or, if shifted, would be beyond car ends.	7,000
	—Next to loaded flat car, except closed TOFC/COFC equipment, auto carriers, specially equipped car with tie-down devices, or car with permanent bulkhead.	6,000
	—Next to operating temperature-control equipment or internal combustion engine in operation.	7,000
	—Next to placarded car, except one from same placard group or COMBUSTIBLE.	7,000
	For other rail cars:	
	—Next to placarded car, except one from same placard group or COMBUSTIBLE.	5,000
	Placard Group 4—Class 7 (radioactive) materials.	
	For rail cars:	
	—Next to locomotive or occupied caboose	8,000
	—Next to placarded car, except one from same placard group or COMBUSTIBLE.	5,000
	—Next to carload of undeveloped film	3,000
174.86	Exceeding maximum allowable operating speed (15 mph) while transporting molten metals or molten glass.	3,000
174.101(o)(4)	Failure to have proper explosives placards on flatcar carrying trailers/containers placarded for Class 1. (Except for a complete failure to placard, the unit of violation is the placard.).	
	—Complete failure to placard	7,500
	—One placard missing (add $1,000 per missing placard up to a total of three, then use the guideline above).	1,000
174.104(f)	Failure to retain car certificates at ''forwarding station''	1,000
	Failure to attach car certificates to car. (Unit of violation is the certificate, 2 are required.).	1,000
174.204	Improper tank car delivery of gases (Class 2 materials)	3,000
174.304	Improper tank car delivery of flammable liquids (Class 3 materials)	3,000
174.600	Improper tank car delivery of materials extremely poisonous by inhalation (Division 2.3 Zone A or 6.1 Zone A materials).	5,000
	PART 178	
178.2(b)	Package not constructed according to specifications—also cite section not complied with.	
	—Bulk packages, including portable tanks	8,000
	—55-gallon drum	2,500
	—Smaller package	1,000
	PART 179	
179.1(e)	Tank car not constructed according to specifications— also cite section not complied with. (Note: Part 179 violations are against the builder or repairer. Sections in this Part are often cited in conjunction with violations of §§172.330 and 173.31 (a)&(b) by shippers. In such cases, the Part 179 sections are cited as references, not as separate alleged violations.).	8,000
179.6	Repair procedures not in compliance with Appendix R of the Tank Car Manual.	5,000

[1] See §172.334.
[2] See §172.516.
[3] Varies.
[4] See specific section.
[5] See penalties: 172.700–.704.

[61 FR 38647, July 25, 1996]